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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DEBORAH BELCASTRO-BOWEN, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC. and
MARILYN WILEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners

July 1991

QUESTION PRESENTED

When an attorney enters into a settlement agreement without his clients' knowledge or consent, may a district court certify a "settlement class" in order to force the clients and potential class members to abide by the terms of that unethical and otherwise unenforceable agreement?

LIST OF PARTIES

The petitioners are Deborah Belcastro-Bowen; Marleena Reiser; Alice Moloney Adams; Pamela R. Bailey; Judith D. Beal; Carol Bunce; Stephanie Cohen; Deborah L. Connor-Cook; Barbara J. Daly; Sheila J. Dickerson; Wendy Dillon; Joanne H. Doram; Debra DuBord; Connie M. Forde; Roberta May Freeman; Lawrence Hahn; Gail Louise Haller; Emily D. Heath; Carol A. Hogan; Marcella Hunt-Peterson; Carole Leavelle; Sharon Lessinger; Chrissie B. Lovold; Susan L. Magliano; Mary Ann Pearson; Diane Reilly; Toby S. Sadasky; Anabelle Simmons; Cyndee Rae Sinardi; Patricia L. Smith; Pamela Stevens; Rhonda J. Svendsen; Jennifer Terrio; Jo Anne Utz; Laraine Valdespino-Pozzo; Linda Johnson Walden; Janice M. Waller; Cynthia Weber; Gina Youngren; Sandy Yslas-Vanderburg; and Kathi Zablocki.

The respondents are Delta Air Lines, Inc.; and Marilyn Wiley; Lois A. Rees; Angie Nunn; and Michelene Stella-Otery

The parties to the proceedings below are petitioners and respondents in this Court, except that Craig Andrews; Pamela Brenot; Constance S. Cramer; Sandra L. Foley; Barbara Jensen-Amdjadi; Sharon Miller; Colleen Smith; Elise Stevens and Cheryl Wendell were appellants below, but are not petitioners in this Court.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Deborah Belcastro-Bowen, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 15, 1991.

OPINIONS BELOW

The unpublished memorandum of the Court of Appeals for the Ninth Circuit, entered April 15, 1991, is reprinted in the Appendix at 1a.

The unreported order granting class certification and approving the class settlement, entered June 28, 1989, is reprinted in the Appendix at 12a.

JURISDICTION

The memorandum of the Court of Appeals for the Ninth Circuit affirming the judgment of the district court was entered on April 15, 1991. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 23(c)(1) and (e) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 23(c)(1) and (e)) provide:

(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

Petitioners are former Western Air Lines, Inc. (Western) flight attendants who seek to enforce their rights under an early termination agreement. Petitioners include individuals who were plaintiffs in federal court litigation concerning this agreement and

individuals who intended to initiate or join ongoing litigation. Petitioners are prevented from asserting their contractual rights in federal court due to a settlement agreement which was entered into by one of plaintiffs' attorneys without the plaintiffs' approval or consent. This unethical and unenforceable settlement agreement was imposed upon plaintiffs and other potential class members when the district court used class action procedures to certify a "settlement class" and approve the settlement.

Between 1984 and 1986 Western sought to downsize its workforce by offering an "Early Out" program. Petitioners terminated their careers under this program in exchange for a promise of monetary compensation and lifetime flight passes for them and their families. When Delta Air Lines, Inc. (Delta) acquired Western, Delta refused to abide by the terms of Western's Early Out agreement and eliminated or curtailed the pass privileges.

In 1989, two lawsuits were pending against Delta to enforce the Early Out Agreement, a 42-plaintiff action entitled *Eaton v. Delta Air Lines, Inc.*, No. 87-748 (W.D.Wa.), and a 4-plaintiff action entitled *Wiley v. Delta Air Lines, Inc.*, No. 87-2273 (N.D.Cal.) Jurisdiction was premised on 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 1132. Six of the *Eaton* plaintiffs are petitioners here. The lawsuits had been filed in 1987. A class had not been certified in either case and the *Wiley* court had rejected a prior class certification attempt. By 1989, both courts had denied summary judgment motions by Delta and held that the Early Out Agreement was subject to ERISA.[1]

In January, 1989, plaintiffs' counsel in *Eaton* and *Wiley* entered into a Settlement Agreement with Delta. The Settlement

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[1] The *Wiley* case had proceeded to trial based largely on stipulated facts with which the *Eaton* petitioners here disagree.

Agreement was conditioned upon both the *Eaton* and *Wiley* courts' dismissing plaintiffs' claims with prejudice and upon the *Wiley* court's certifying a class under Fed. R. Civ. P. 23b(1) and b(2). (A-6a.) The Settlement Agreement provided for payment of attorneys' fees to plaintiffs' counsel.

Plaintiffs' attorneys moved the *Wiley* court for class certification and approval of a notice to the settlement class. The motion was supported by the declarations of the three attorneys, who represented Delta and the *Eaton* and *Wiley* plaintiffs, but not by any of the plaintiffs themselves. The declaration of the attorney for the *Eaton* plaintiffs stated, "All 42 plaintiffs whom I represent endorse the settlement agreement and believe it is a fair and equitable resolution of their claims." (A-6a)[2]

This sworn statement by plaintiffs' attorney was false. It was subsequently revealed that *none* of the 42 plaintiffs in the *Eaton* had reviewed and approved the final Settlement Agreement before it was signed by their attorney on their behalf. Four of the five leaders of the *Eaton* plaintiffs actually opposed the Settlement Agreement below.[3] The *Eaton* plaintiffs learned about the Settlement Agreement after it was signed without their

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[2] A condition of the Settlement Agreement was that plaintiffs' counsel certify that all plaintiffs had approved the agreement. As the *Eaton* counsel subsequently admitted, "In order for me, as attorney for all 42 plaintiffs, to execute the agreement, it was necessary for me to affirmatively represent that I had authority on behalf of all 42 to do so."

[3] After the motion to decertify the class was filed, the *Eaton* counsel filed another affidavit which claimed that 37 of his clients provided him after-the-fact approvals. This conflicts with the fact that seven of his clients opposed the settlement below. The leaders of the *Eaton* group testified at the fairness hearing that the Eaton counsel had provided inadequate and incomplete information to secure those approvals.

approval and gave up issues they had wished to preserve. The *Eaton* plaintiffs were provided a copy of the Settlement Agreement only after they complained. As they subsequently testified at the fairness hearing, this process permitted plaintiffs' attorneys to cut their own deal. For example, plaintiffs' counsel in *Eaton* assured his clients in writing that in any settlement he would not agree to the withdrawal of the district court's ERISA ruling, but that is precisely what he agreed to in the Settlement Agreement without his clients' approval.

Based in part on the false affidavit from the *Eaton* plaintiffs' counsel, the court tentatively certified a class and authorized a notice to the class of the Settlement Agreement and a fairness hearing with respect to the agreement.

A group of objectors, consisting of most of the petitioners here, filed a motion to suspend the fairness hearings and decertify the class principally on the ground that the Settlement Agreement had been entered into without approval or authority of the *Eaton* plaintiffs. The court rejected the motion and stated that the *Eaton* plaintiffs could express their objections at the fairness hearing. (A-6a)

Prior to the fairness hearing the court received comments on the settlement from 94 individuals, 84 of whom opposed it. At the hearing, two leaders of the *Eaton* plaintiffs testified against the Settlement Agreement and informed the court it had been signed by their attorney without their approval. None of the 26 individuals who appeared at the hearing favored the settlement.[4]

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[4] At the hearing, it was also disclosed that counsel for the *Wiley* plaintiffs contacted the leader of the objectors in a series of abusive calls to obstruct opposition to the settlement. He cursed the leader and accused her of costing him money, stating, "I'm out of

(continued...)

On June 25, 1989, the district court issued its order certifying a class and approving the settlement. The court failed to acknowledge or discuss the fact that the Settlement Agreement on which the entire class certification proceeding was based was signed by the *Eaton* plaintiffs' counsel without his clients' approval. Similarly, the court did not address the misrepresentation which this same counsel made to the court on this subject in order to secure class certification.

On appeal to the Ninth Circuit, petitioners argued that court should not use class action procedures to sanction a settlement which was entered into unethically and was otherwise unenforceable. The panel rejected this argument and relied upon the district court's preliminary finding that the conduct of the *Eaton* plaintiffs' counsel had not "tainted" the decision by the court "to tentatively certify the class and to request a fairness hearing on the proposed settlement." (A-6a)

The district court's preliminary finding, on which the appellate panel exclusively relied, was made prior to the testimony of the *Eaton* plaintiffs themselves at the fairness hearing. This preliminary finding was based in part upon the hearsay concerns and was expressly conditional upon reviewing further evidence at the fairness hearing. (A-6a) The testimony at the fairness hearing by the *Eaton* plaintiffs removed all hearsay concerns and established beyond cavil that the Settlement

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[4](...continued)
pocket $4,500 so far; into this for $50,000. If you oppose me, I won't get paid." He also said, "It will cost you at least $15,000 if you oppose the settlement. You won't be able to find an attorney to take your case. Once they find out that I'm involved no one will touch it." He concluded by stating that "he would have [presiding judge] D.L. Jensen's signature on the certification papers and there was nothing [she] could do to stop him."

Agreement was entered into without the *Eaton* plaintiffs' approval and that counsel misrepresented this fact to the district court in an affidavit. Neither the district court not the court of appeals alluded to this testimony at the fairness hearing nor made any findings whatsoever concerning this evidence.

REASON FOR GRANTING THE WRIT

THE ISSUE OF WHETHER CLASS ACTION PROCEDURES MAY BE USED TO EVADE AN ATTORNEY'S ETHICAL OBLIGATIONS AND TO SANCTION UNETHICAL SETTLEMENT AGREEMENTS IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The decisions below have undercut the bedrock ethical principle that an attorney may not settle an action without the express permission of the client. The decisions, if unreviewed, will permit attorneys to impose settlements upon their unwilling clients by the creation of a "settlement class." The Court should take review to close down this abuse of the class action procedures and the flouting of the canons of ethics. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (certiorari granted to resolve important issue under Federal Rules of Civil Procedure).

The dangers of certifying a class solely for settlement purposes has been widely recognized, and the practice has been criticized by reviewing courts. *Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987) (cases collected); *Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (trade-offs at the expense of the class members may occur); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (possibility of collusion or undue pressure by the defendants on would-be class representatives); *see Matter of American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988)

(lawyer may settle too quickly rather than risk all or may accept a settlement package slanted in favor of the fee component). *Manual for Complex Litigation,* § 30.45 (2d ed. 1986) ("Ordinarily, a class action determination should be made not only before a settlement is reached, but indeed before settlement discussions are commenced.").

As detailed by Judge Posner in *Mars Steel,* the certification of a settlement class, typically occurring years after the case was filed and solely to implement a settlement, jostles uneasily with Fed. R. Civ. P. 23(c)(1) which requires class certification to occur as soon as practicable. In addition, when the status of a class action is not determined until after a settlement is negotiated, "the danger of a premature, even a collusive settlement is increased." 834 F.2d at 680. As the court further noted, "Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest." 834 F.2d at 677. Where a settlement class is certified when there is no genuine underlying settlement, the attorneys have completed the transformation envisioned by the *Mars Steel* court and become the real parties in interest.

An attorney has an absolute ethical duty to secure a client's approval before entering into a settlement agreement. *Harrop v. Western Air Lines, Inc.,* 550 F.2d 1143, 1145 (9th Cir. 1977) (*citing* ABA Code of Professional Responsibility, Canon 7, Ethical Consideration 7-7)[5]; *Fennell v. TLB Kent Co.,* 865 F.2d 498, 501 (2d Cir. 1989); ABA Model Rules of

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[5] Ethical consideration 7-7 states: "[T]he authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer...."

Professional Conduct, Model Rule 1.2(a) (1989) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."). If an attorney is permitted sign a settlement agreement in violation of that duty and then impose that unethical settlement upon his dissenting clients through the use of a settlement class, the unethical conduct is sanctioned. It is even rewarded if attorneys' fees are part of the settlement.

Attorneys have no actual or implied authority to settle an action without their clients' approval. *Harrop; Fennell; Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987) Settlement agreements are invalid and unenforceable where the clients did not approve them. *Id.* The rights of clients should not be diminished simply because the attorney exceeds his authority even further and secures cerification of a settlement class.

The decisions below, if permitted to stand, would permit an attorney to cut a deal without his clients' approval, and then impose that settlement upon them and the entire class. For example, the *Eaton* plaintiffs below refused to give up their rights under ERISA. Their attorney ignored this instruction and settled without preserving his clients' ERISA rights. The attorney then bootstrapped this unauthorized settlement to secure a certification of a settlement class. As a result of the attorneys' unethical conduct, the clients lost their ERISA rights and the attorney secured his fees.

Without a valid settlement between the parties, the rationale for a settlement class collapses. The premise of a settlement class is that the parties voluntarily entered into a settlement, based upon their own goals and assessment of the case. Without a genuine settlement between the parties or without a prior certification of the class and the imposition of

class responsibilities on counsel, the danger of collusion is too great for a settlement class to be certified.

If the procedures below are permitted to stand, attorneys will be free to negotiate settlements without a duty to their clients or the class. The duty to the clients has been eliminated since the settlement need not meet their approval. The duty to the class never existed during the settlement negotiations because the class had not yet been certified.[6] In short, the procedures sanctioned by the courts below give attorneys unbridled discretion to enter into collusive settlements.

CONCLUSION

The Court should grant the writ of certiorari to prevent the use of settlement classes under Fed. R. Civ. P. 23 to impose unethical and otherwise unenforceable settlement agreements upon an attorney's own clients.

Respectfully submitted,

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300

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[6] Thus, the district court found that the plaintiffs' attorneys did not have a duty to the class until the court certified the class. (A-20a-21a)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN WILEY; LOIS A. REES; ANGIE NUNN; MICHELENE STELLA-OTERY, Plaintiffs-Appellees, v.	)	
DELTA AIR LINES, INC.; WESTERN LINES, INC., Defendants-Appellees, v.	)	No. 89-16141 DC# C-87-2273-DLJ
DEBORAH BELCASTRO-BOWEN, et al., Objectors-Appellants.	)	

MARILYN WILEY; LOIS A. REES; ANGIE NUNN; MICHELENE STELLA-OTERY, Plaintiffs-Appellees,	) No. 89-16142
v.	) DC# CV-87-2273-DLJ
DEBORAH BELCASTRO-BOWEN, Appellant,	) **MEMORANDUM***
v.	
WESTERN AIRLINES, INC.; DELTA AIR LINES, INC., Defendants-Appellees.	

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted March 13, 1991
San Francisco, California

Before: BREEZER and NOONAN, Circuit Judges, and JONES**, District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** Honorable Robert E. Jones, United States District Judge for the District of Oregon, sitting by designation.

FACTUAL BACKGROUND

On October 1, 1984 Western Airlines, Incorporated (Western) and the Association of Flight Attendants (AFA) entered into an "early-out" agreement which gave permanent flight passes to flight attendants who voluntarily left Western's employment between September 1, 1984 and December 31, 1986 for reasons other than cause. A successor clause in the early-out agreement stated in pertinent part as follows: "Pass and reduced-rate transportation . . . shall mean pass and reduced rate transportation on Western Airlines, Inc. [or] any . . . merged company or companies . . . ."

The agreement split the early-out participants into two groups. Attendants with more than fifteen years of service and their spouses were assigned an F-1 pass -- the same pass which Western issued to its active employees with more than five years service and to its retirees with more than fifteen years of service. The F-1 pass entitled eligible children and parents of the attendants up to eight passes per year, depending on the attendant's length of employment. Attendants with ten to fifteen years of experience and their spouses were given an H-1 pass -- the same pass which Western issued to its active employees with less than five years of service and to its retirees with less than fifteen years of service.

The F-1 and H-1 cards entitled qualifying flight attendants and their spouses to an unlimited number of passes on Western's system. F-1 cardholders had boarding priority behind paying passengers and company officials; boarding among the F-1 cardholders depended upon arrival time at the gate. H-1 cardholders boarded behind all F-1 cardholders; boarding priority among H-1 cardholders also depended upon arrival time at the gate.

On April 1, 1987 Western merged with Delta Airlines, Incorporated (Delta). The pass systems of the two airlines differed

significantly so perfect integration was impossible. Delta issued to its active employees an SA-3 pass which gave them boarding priority behind corporate officials. Delta issued to its retirees an SA-3B pass which gave them boarding priority behind active employees. Unlike Western's system, boarding within each Delta class was determined by seniority.

Delta gave all Western employees who became active Delta employees SA-3 passes; Western retirees were given SA-3B passes. Delta did not have any type of early-out arrangement with its employees so Delta created a new pass, the SA-4B pass, for the participants of Western's early-out program. The SA-4B pass entitled the early-outs and their spouses to an unlimited number of passes; parents and children of the early-outs were given up to eight passes a year. However, four distinct characteristics of the SA-4B class gave rise to dispute: (1) early-outs boarded behind all active Delta employees and retirees; (2) tickets could not be obtained at the gate; (3) a service charge was enacted; and (4) travel was restricted to Western's previous route structure.

PROCEDURAL BACKGROUND

On May 6, 1987, Marilyn Wiley and three other former Western flight attendants sued Delta in Federal Court in San Francisco, alleging that Delta's modifications to Western's early-out program violated the Employee Retirement Income Security Act (ERISA) and the terms of the early-out agreement. Specifically, the *Wiley* plaintiffs challenged the four provisions mentioned above. They sought injunctive relief restoring their alleged contractual rights and monetary damages for any travel expenses caused by the modifications. Forty-two former Western attendants filed a similar action, the *Eaton* action, in Seattle on May 28, 1987.

Both courts summarily determined that the early-out agreement constituted a welfare benefit plan subject to ERISA, 29 U.S.C. § 1002(1). The *Wiley* court reserved for trial the questions whether Delta's modifications to the early-out program were permissible under ERISA or the early-out agreement, and whether Delta could alter the agreement pursuant to the Railway Labor Act's merger rules. The *Wiley* court also denied class certification, subject to reconsideration.

On November 21 and 22, 1988, District Judge Lowell Jensen heard the *Wiley* case. The case was tried pursuant to a forty-six page stipulation of facts which Delta and Wiley's counsel had agreed to on November 8, 1988. Under the stipulation the plaintiffs agreed *inter alia* that the maximum relief they sought was the boarding priority of Delta's retirees; they further agreed that the merger clause did not require "an acquiring carrier to expand the early-out travel privileges to the carrier's entire route. . . . "

Meanwhile, in Seattle, District Judge William L. Dwyer ordered mediation in the *Eaton* case. On December 15, 1988, an experienced Seattle labor attorney, H. Clemens Barnes, conducted the mediation which was attended by Delta's attorneys, the Eaton plaintiffs' attorney and five of the *Eaton* plaintiffs.

On January 31, 1989, while the *Wiley* court's ruling was still pending, counsel for Delta and counsel for the *Eaton* and *Wiley* plaintiffs entered into a tentative settlement agreement. The agreement gave the early-outs and their spouses an unlimited number of passes to travel on Delta's domestic system, which included the continental United States, Alaska, Hawaii, Mexico, Puerto Rico, the Bahamas, and Bermuda, but it denied them access to Delta's trans-Atlantic and trans-Pacific routes; it placed the early-outs in Delta's retiree class; it promised them the same pass privileges as retirees; it dismissed all claims for damages; and it denied any protection under ERISA. The agreement also

eliminated the service charge and allowed the early-outs to obtain passes without going through Delta's pass bureau. Finally, the agreement gave plaintiffs' counsel $85,000 in attorneys' fees.

The agreement was subject to both courts dismissing the actions with prejudice and to a class being certified by the *Wiley* court under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2). On February 15, 1989 the *Wiley* court tentatively certified the class and ordered the parties to send notice of the tentative agreement and class settlement to the 612 potential class members. The court set a Rule 23(e) fairness hearing date for May 19, 1989.

Seventy-eight potential class members filed objections with the court prior to the fairness hearing; ten potential class members filed favorable comments. Sixty-four flight attendants organized themselves into a group, the Bowen/Reiser group, to oppose the settlement; the Bowen/Reiser group comprises the objectors who have appealed.

On March 28, 1989 the Bowen/Reiser group filed a motion to suspend the fairness hearing and decertify the class. In particular the motion attacked Frederic Reed's declaration which stated: "All 42 plaintiffs whom I represent endorse the settlement agreement and believe it is a fair and equitable resolution of their claims." The Bowen/Reiser group allegedly learned through conversations with several *Eaton* plaintiffs that this statement was not true and that the agreement had been entered into without the plaintiffs' approval. On April 26, 1989, the district court held a hearing and denied the motion; the court expressed concern over the hearsay nature of the evidence and stated the *Eaton* plaintiffs could raise their concerns at the fairness hearing.

At the fairness hearing on May 19, 1989, the court heard oral testimony from twenty-six persons, all opposing the settlement. The court also heard argument from the objectors' attorneys and

from the attorneys for the plaintiffs and Delta. On June 28, 1989 the district court entered an order approving of the settlement and certifying the class under Rules 23(a), 23(b)(1) & 23(b)(2).

In the order the court first discussed the requirements of Rule 23(a) and found that they had been satisfied. The court paid particular attention to the adequacy of representation by class counsel. The court also discussed the requirements of Rules 23(b)(1) & 23(b)(2) and determined that they too had been met. The court then discussed whether the settlement was "fundamentally fair, adequate, and reasonable." The court looked at each part of the agreement and described that which the plaintiffs had gained and that which they had lost. The court found that the compromises which each side had made were reasonable and concluded that the agreement was adequate and fair. Judge Jensen explained that he was in a unique position to make this determination because he had "heard the merits of the case fully litigated at trial prior to evaluating the settlement," and was in fact "prepared to issue a ruling on the merits of the action at the time the parties presented the proposed settlement agreement." In the end, Judge Jensen was "doubtful the plaintiffs could have achieved such an outcome" from the court.

On July 5, 1989 the district court entered an order vacating its prior summary adjudication and dismissed the action with prejudice. We affirm.

DISCUSSION

Appellants contend that the district court abused its discretion in accepting the settlement agreement and in certifying the class. They argue that the district court was required to, but did not, make a specific finding that the settlement was not the product of collusion, fraud or overreaching. They also argue that the district court abused its discretion because it approved of an

agreement which had "stripped" appellants of their seniority status and which did not provide for damages, Trans-Atlantic and Pacific travel, or reduced-rate passes for parents. We are not persuaded by these arguments.

A. Standard of Review

"Class certification is a matter within the district court's discretion, and is reviewed to determine whether there has been an abuse of discretion and application of impermissible legal standards." *Probe v. state Teachers' Retirement System*, 780 F.2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986) (citation omitted). However, because this class was certified after a tentative settlement agreement had been reached, we will examine the fairness of the agreement closely in making our determination whether the district court abused its discretion. *Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 834 F.2d 677, 680-81 (7th Cir. 1987); *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

B. Collusion, Fraud and Overreaching

Relying primarily on *Ficalora v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), and *Officers For Justice v. Civil Service Comm'n of the City and County of San Francisco*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983), appellants contend the district court abused its discretion because it failed to make a specific finding that the agreement was not "the product of fraud or overreaching by, or collusion among the negotiating parties." Appellants misread *Officers For Justice* and *Ficalora*.

Officers For Justice explained that a district court should evaluate a proposed class action settlement using the universal standard by which all settlements are judged -- whether the settlement is "fundamentally fair, adequate, and reasonable."

Officers For Justice, 688 P.2d at 625 (citation omitted). The court explained that this determination necessarily will involve, depending upon the unique facts of a particular case, "a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; . . . the amount offered in settlement; the extent of discovery completed; and the stage of the proceedings; . . . ." *Id* (citations omitted).

The court then stated:

> The district court's role in evaluating a proposed settlement must be tailored to fulfill the objectives outlined above. In other words, the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id.

Ficalora expounded on the standard articulated by *Officers For Justice*. *Ficalora* stated: "the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned parties." *Ficalora*, 751 F.2d at 997 (citing *Officers For Justice*, 688 F.2d at 625). In *Ficalora* there were allegations of overreaching and potential conflicts of interest by the negotiating parties, and "the district court record reveal[ed] *no inquiry* by the court into the questioned activities of plaintiff class counsel with respect to the named plaintiff, Ficalora." *Id* (emphasis added). Because the record in *Ficalora* was totally void

of any inquiry by the court into the questioned activities by class counsel, this court remanded the case and instructed the district court to determine "the amount of attorney's fees received by plaintiff-class counsel and whether the early closing of the case by settlement sacrificed any interest of the named plaintiff." *Id.* The district court was instructed to examine the objections in detail and "examine the settlement for possible conflicts of interest . . . ." *Id.*

Hence, the standard which the district court in the case at bar was required to use in determining whether to accept the proposed class settlement was whether the settlement was "fair, adequate, and reasonable." It must also be clear from the record that the district court "reach[ed] a reasoned judgment that the proposed agreement [was] not the product of fraud or overreaching by, or collusion among, the negotiating parties." *Id.*

The district court's order satisfies the letter and spirit of *Ficalora* and *Officers For Justice*. The court set forth the relevant factors to be considered, examined the agreement in detail, and then explicitly determined that the agreement was fair, reasonable and adequate. The court's order and the record as whole also make clear that the court came to a reasoned judgment that the agreement was not the product of fraud, collusion or overreaching. Not only did the court find the agreement to be fair, reasonable, and adequate, the court also concluded that anything the plaintiffs conceded was done in the spirit of compromise that is necessary to achieve any settlement." Implicit in these conclusions is that there was no wrongdoing on the part of the negotiators.

Moreover, unlike the record before the *Ficalora* court, the record before us reveals that the district court did inquire into the questioned activities of class counsel. The court's order responded to the specific allegations of impropriety against David Rosenfeld in its discussion of the adequacy of representation. The court noted that Rosenfeld was "not always gracious and patient when dealing

with class members" and did not "respond to all requests for legal advice," but the court concluded that these actions "did not prejudice the case he competently and vigorously presented" to the court. The court made that statement after having observed Rosenfeld at numerous hearings and a two-day trial.

As to the questioned activities of Frederic Reed, the district court reviewed the written allegations, received supplemental declarations from Reed explaining his declaration, held a hearing, and then concluded that his conduct had not "tainted" the decision by the court "to tentatively certify the class and to request a fairness hearing on the proposed settlement." Finally, contrary to appellants' allegations, the court did respond specifically to the objectors' concerns about the attorneys' fees. The district court found the fees to be "reasonable," and noted: "it is sometimes a distasteful reality that the practice of law is a business and that lawyers are entitled to fees for their service."

In sum, the district court did exactly what this court has asked district courts to do when deciding whether to accept a proposed class settlement agreement. The record makes clear that district court came to a reasoned judgment that the agreement was not the product of fraud, collusion, or overreaching, and the district court expressly determined that it was fair, reasonable and adequate to all concerned parties.

D. Appellants' Remaining "Abuse of Discretion" Arguments

Appellants also argue that the district court abused its discretion by approving of a settlement which did not provide for damages, traded away the early-outs' right to early-outs international travel, stripped away the seniority status of the early outs, and eliminated reduced-rate passes for parents. These arguments amount to nothing more than a request that this court review the details of the agreement to determine whether it is fair.

The district court was in a unique position to determine the fairness of this particular settlement agreement. The court had conducted a two-day trial and was prepared to issue a ruling on the merits when the parties presented the court with the agreement. The court issued a twenty page order explaining why it found the agreement to be reasonable, adequate, and fair; indeed, the court was "doubtful the plaintiffs could have achieved such an outcome." This court's independent review of the record supports the district court's conclusion. Accordingly, we hold that the district court did not abuse its discretion.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARILYN WILEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	C87-2273-DLJ
v.	)	ORDER GRANTING CLASS
DELTA AIR LINES, INC.	)	CERTIFICATION AND
and WESTERN AIR LINES,	)	APPROVING THE CLASS
INC.,	)	SETTLEMENT
	)	
Defendants.	)	
	)	
	)	

The Court held a fairness hearing regarding class certification and class settlement in this action on May 19, 1989. Appearing for plaintiffs Marilyn Wiley, at al., was David A. Rosenfeld of Van Bourg, Weinberg, Roger & Rosenfeld. Appearing for plaintiffs in a related lawsuit, *Eaton v. Delta Air Lines;* C87-0748 (E.D.Wash), who are proposed class members, was Fredric D. Reed of Maltman, Weber, Reed, North & Ahrons. Appearing for defendants Delta and Western Air Lines were Gilmore F. Diekmann, Jr. of Bronson, Bronson & McKinnon and Walter A. Brill of Delta Air Lines. James C. Sturdevant of Sturdevant & Sturdevant and Thomas R. Gibbon of Bell, Boyd & Lloyd appeared for objectors to the proposed settlement and class certification Deborah Belcastro-Bowen and Marleena Reiser, et al., ("the Bowen Group").

Plaintiffs Marilyn Wiley and three other former Western Air Lines flight attendants brought this action under ERISA, 29 U.S.C. § 1002, *et seq.*, and the provisions of a letter of agreement

issued to Western flight attendants who took an "early-out" option and prematurely terminated their employment at Western. The suit seeks a permanent injunction preventing defendants from terminating or modifying the reduced rate travel provisions of the letter of agreement entered into between Western and the Association of Flight Attendants ("AFA") in conjunction with a collective bargaining agreement on October 1, 1984.

The letter of agreement provides benefits to all flight attendants who chose a voluntary "early-out" termination plan between the date of the agreement and December 30, 1986. The benefits of the agreement included: (1) termination pay for 24 months; (2) medical insurance for up to 12 months; and (3) reduced rate travel passes. The agreement states that the travel passes "may not be used . . . in violation of the then effective pass policies," and also contains a successor clause which provides that:

> Pass and reduced rate transportation referred to in this Letter of Agreement shall mean pass and reduced rate transportation on Western Air Lines, Inc., any successor or merged company or companies, any successor in control of the company, any parent or holding company in control of the company, any reorganized company or companies, its parent(s) or subsidiary(ies).

On April 1, 1987, Western merged with Delta Air Lines and ceased to exist. Delta thereafter modified certain aspects of the reduced rate travel program to fit within its existing travel pass structure. Plaintiffs allege that these modifications had the following effects on "early-out" Pass holders: (1) substantially increased the cost of pass travel; (2) reduced boarding priority; and (3) required that tickets be obtained several weeks in advance rather than on the date of travel. In addition, Delta announced that it would honor the passes only on routes previously flown by

Western, and would not expand the program to include all Delta routes. Delta contends that the modifications did not have the effects alleged by the plaintiffs, were reasonable in light of the necessity of fitting the Western pass structure within Delta's system, and were necessary to comply with federal tax regulations.

Cross-motions for summary judgment were heard by the Court on January 6, 1988. In these motions, plaintiffs sought a ruling that the "early-out" program constituted an ERISA plan while conceding that genuine issues of material fact existed concerning whether or not Delta could alter the travel pass plan within the "early-out" agreement without breaching the terms of the agreement and their fiduciary duty under ERISA. Plaintiffs also sought to have a Federal Rule of Civil Procedure 23(b)(2) class certified of all former Western employees covered by the collective bargaining agreement who took the "early-out" agreement. Defendants requested the Court to rule that the travel benefits do not fall within the scope of ERISA, the modifications were within defendants' rights under the terms of the agreement and that the agreement was nullified by the merger of Western and Delta.

On June 13, 1988, the Court issued an order finding that:

(1) the travel pass program provision of the early-out program constitutes an "employee welfare benefit plan" within the meaning of ERISA, 29 U.S.C. § 1002(1);

(2) that genuine issues of material fact exist regarding whether the defendants violated their contractual obligations and fiduciary duty by modifying the travel pass provisions, thereby making summary Judgment on these issues inappropriate;

(3) that genuine issues of material fact exist regarding whether or not the letter of agreement is binding on Delta

following the merger of Delta and Western, thereby making summary judgment on this issue inappropriate; and

(4) that class certification is denied as plaintiffs have not met the requirements of Rule 23(a) & (b)(2).

Therefore, there were two critical issues left for the court to determine at trial. First, the Court had to decide whether Delta was bound by the terms of the letter of agreement following the merger of Delta and Western. Second, the Court had to rule on the issue of whether Delta breached its fiduciary duty under ERISA or the terms of the letter of agreement by altering the travel pass benefits provided to the early out flight attendants.

To resolve the latter issue, the Court would have to evaluate the alterations made by Delta in the "early-out's" travel pass benefits. Specifically, the following changes were made by Delta: (1) Western "early-out" attendants' pass cards which enabled the "early-outs" to utilize available space on Delta flights by simply showing up at the airport without obtaining a travel pass from the Delta pass bureau ahead of time were revoked; (2) a service charge for use of the travel benefits was enacted; (3) the boarding priority of the "early-outs" was reduced, placing them behind Delta active employees and retirees in boarding priority; and (4) Delta only honored the travel benefits on Western's existing route structure at the time of the merger.

The original parties in this action, Marilyn Wiley, et al., Western and Delta, litigated these issues during a trial before this Court in November, 1988. The Court took the matter under submission following trial. Before the Court issued a ruling, the original parties entered into a proposed settlement agreement which was presented to the Court in February, 1989. A condition of the settlement was that a Rule 23(b)(1) and 23(b)(2) class be certified of all former Western employees who were entitled to travel

benefits under the "early-out" program. The Court issued an Order, dated February 15, 1989, tentatively approving the settlement agreement and certifying a class of all former Western employees who participated in, qualified for and received travel benefits under the "early-out" agreement. This ruling was tentative and subject to modification or recession following a full hearing at a fairness hearing held pursuant to Federal Rule of Civil Procedure 23(e).

The February 15 Order required the parties to provide notice of the proposed settlement and class certification to all class members. This notice included the terms of the proposed settlement and class certification and informed all class members of their right to object to the settlement by written notice to the Court and by appearing in person or through an attorney at the fairness hearing. This notice was dispersed to the proposed class members through the United States mail.

The Court received a large number of responses to the settlement notice prior to the fairness hearing. The responses both supported and opposed the settlement agreement and class certification although the majority of the class members who filed comments oppose the proposed settlement. A group of approximately sixty "early-out" attendants opposing the settlement and class certification, the Bowen Group, retained the law firm of Bell, Boyd & Lloyd to represent them at the fairness hearing.

At the May 19 hearing, the Court heard the oral arguments of counsel for plaintiffs in the Wiley action and counsel for Delta in support of class certification and approval of the settlement agreement, the oral argument of counsel for the Bowen Group against class certification and approval of the settlement and the testimony of twenty-six members of the proposed class in opposition to settlement approval and class certification. All proposed class members who attended the fairness hearing were

given the opportunity to address the Court regarding the settlement agreement and class certification.

After considering the briefs submitted by the parties, the record in this action, the proposed settlement agreement and the testimony and comments of proposed class members, the Court hereby finds that (1) certification of a Rule 23(b)(1) and 23(b)(2) class consisting of all former Western employees who receive travel benefits under the "early-out" agreement is appropriate, and (2) the proposed settlement agreement is approved.

I.

In order to have a Rule 23(b)(1) or 23(b)(2) class certified, plaintiffs must meet both the requirements of Rule 23(a) and Rule 23(b)(1) or 23(b)(2). Fed. R. Civ. P. 23. Rule 23(a) requires that a proposed class satisfy four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The party moving for class certification has the burden of demonstrating that a proposed class contains each of these elements. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977).

The Court finds that the class outlined in the proposed settlement agreement consisting of all former Western employees who participated in, qualified for and received travel benefits under the "early-out" program on or after September 1, 1984, satisfies the requirements of Rule 23(a), 23(b)(1) and 23(b)(2).

A. Numerosity

To satisfy this requirement, the party seeking certification must establish that the class is so large that joinder of all parties would be impracticable. The proposed class consists of 612 former Western employees. The Court finds that the size of the class

makes joinder of all the class members in a single action impracticable.

B. Commonality

The rights of all of the "early-out" participants to travel benefits are governed by letters of agreement which are similar as to timing and terms to the flights attendants' agreement. Therefore; common questions of law including (1) whether the merger released Delta from any obligations under the letter of agreement, and (2) whether Delta breached its duty under ERISA or the terms of the agreement by modifying the travel benefits program, exist among all class members.

3.[sic] Typicality

The named plaintiffs in the present action are seeking remedies, improved travel benefits and monetary damages identical to the remedies sought by the other members of the proposed class. Accordingly, the Court finds that typicality requirement of Rule 23(a) is satisfied.

4.[sic] Adequacy of Representation

This issue concerns whether plaintiffs are represented by competent counsel and whether plaintiffs' counsel has any interests that are antagonistic to those of the class members. *See, e.g., In Re Activision Securities Litigation,* 621 F.Supp. 415, 429 (N.D.Cal. 1985).

The Bowen group contends that plaintiffs' counsel, David A. Rosenfeld, failed to adequately represent the class for the following reasons: (1) plaintiffs' counsel entered into allegedly prejudicial pretrial stipulations; (2) Rosenfeld did not seek job reinstatement for plaintiffs; (3) there was not an adequate

investigation made into the issue of monetary damages; (4) Rosenfeld was abusive to class members and failed to respond to legal inquiries; and (5) a conflict of interest exists between the class and plaintiffs' because of the attorneys' fee award in the settlement agreement. The Bowen Group's arguments are not persuasive.

The pretrial stipulations which the Bowen Group contends are evidence of Rosenfeld's inadequate representation concern boarding priority and the route structure available to "early-outs." Stipulation number 127 states that "[i]n adopting the travel privilege letter of agreement, Western and its unions intended to give the early-out participants the same pass priority as retirees." The Bowen Group contends that this stipulation prejudiced plaintiffs' position at trial because prior to the merger, plaintiffs were entitled under the letter of agreement to a boarding priority equal to active, not retired, Western employees. This position is without merit. The record in this action and the language of the letter of agreement support plaintiffs' counsel's conclusion that the intention of the parties who entered into the letter of agreement was that "early-out" employees were entitled to a boarding priority equivalent to that of Western retirees, not active employees. There is no language in the letter of agreement or other evidence sufficient to support a contrary conclusion. Accordingly, plaintiffs' counsel's decision to enter into stipulation number 127 was reasonable and sound.

Stipulations 134-136 state that the successor clause in the "early-out" agreement did not require a successor air line to provide travel benefits on routes outside western's route structure. The Bowen Group argues that Rosenfeld stipulated away rights of the plaintiff class by conceding that plaintiffs were not entitled to travel benefits on all of Delta's route structure. This argument is also without merit. The evidence at trial and the language of the agreement clearly indicate that Delta was free to limit the "early-outs" to travel only on Western's flight structure.

Accordingly, plaintiffs' counsel's decision to stipulate on this issue does not indicate that plaintiffs were not adequately represented in this action.

Rosenfeld's decision not to seek job reinstatement was also a reasonable decision by plaintiffs' counsel. It is unreasonable to assume, even if it were possible as a matter of law, that the "early-outs" employees would return all of the benefits they received under the "early-out" agreement in order to return to work at Western. The vast majority of the class members are solely interested in improving their travel benefits, not in returning to jobs they left years ago. Plaintiffs' counsel's decision not to seek reinstatement was a sound tactical choice.

The Bowen Group argues that plaintiffs' counsel failed to conduct an adequate investigation to determine whether damages should be sought in this case. The evidence before this Court does not support a conclusion that plaintiffs' counsel failed to carry out an adequate investigation in this regard. Moreover, it does not appear that the members of the class have suffered substantial, measurable damages as a result of Delta's modifications of their travel benefits. Although there is evidence of "early-outs" being unable to secure seats on certain flights under the Delta system and thereby being inconvenienced, significant issues remain as to the cause and substantiality of any damages associated with these incidents.

The Bowen Group also contends that plaintiffs, counsel was abusive to class members and failed to respond to their legal inquiries. There has been a showing made that Rosenfeld was not always gracious and patient when dealing with class members and that he did not respond to all requests for legal advice. However, these actions did not prejudice the case he competently and vigorously presented to this Court. In addition, Rosenfeld was technically not representing the class members, other than the

named plaintiffs, before this Court tentatively certified the class following trial. Thus, any refusal on his part to respond to legal inquiries beyond the direct issues related to class certification was not inappropriate until after the class was in fact certified.

Finally, the Bowen Group alleges that the attorneys' fee award in the settlement creates a conflict of interest between plaintiffs' counsel and the class. This argument also is unpersuasive. It is a sometimes distasteful reality that the practice of law is a business and that lawyers are entitled to fees for their services. Moreover, the Supreme Court has stated that it is not improper for a fee award to be included in a class action settlement. *Evans v. Jeff D.*, 475 U.S. 717 (1986). Accordingly as the fee award of $85,000.00, approximately $46,000 of which plaintiffs' counsel will receive, is reasonable, there is no conflict of interest created by its inclusion in the settlement.

Therefore, the Court finds that the class members received adequate representation from plaintiffs' counsel during the course of this litigation.

In addition to satisfying the four requirements of Rule 23(a), a class must also meet the requirements of Rule 23(b)(1) or 23(b)(2) to be certified as a mandatory class. Members of a class certified under either of these rules may not opt-out of the class and pursue individual actions. Certification of a 23(b)(1) class is appropriate when "the prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications . . ., or (B) adjudications with respect to individual members of the class would . . . be dispositive of the interest of other members not parties to the adjudications." Fed. R. Civ. P. 23(b)(1). Certification of a 23(b)(2) class is appropriate when "the opposing party has acted or refused to act on grounds generally applicable to the class" and the class is seeking "final injunctive" or "declaratory relief." Fed, R. Civ. P. 23(b)(2).

Generally, actions seeking predominantly monetary damages should not be maintained under Rules 23(b)(1) or (2). *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977).

The present case is an appropriate case for class certification under Rule 23(b)(1) and 23(b)(2) If class members are allowed to opt-out of the class and bring individual actions, Delta could be faced with incompatible judgments forcing the air line to establish separate travel benefit programs to comply with each judgment. From a practical standpoint, it is necessary that Delta be allowed to treat all class members in the same manner with regards to travel benefits. This can be accomplished by certifying the class under Rule 23(b)(1) or 23(B)(2), thereby preventing the possibility of conflicting judgments or settlements. Moreover, Delta has acted on grounds generally applicable to the entire class by imposing the same travel restrictions within the benefit program on all Western "early-outs." Injunctive relief in the form of a single restructured travel benefits program is therefore appropriate for the class as a whole.

Accordingly, the Court hereby *certifies, under Rule 23(b)(1) and 23(b)(2), the proposed class of all former Western employees who participated in, qualified for and received travel benefits under Western's "early-out" program.

In evaluating the proposed settlement agreement, "the court must determine whether the settlement is "fundamentally fair, adequate, and reasonable.'" *San Francisco NAACP v. San Francisco United School District*, 576 F. Supp. 34, 43 (N.D.Cal. 1983) (quoting *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982)). In doing so, the court must consider the following factors: "the strength of the case; the reasonableness of the settlement in light of the attendant risks of litigation; and in light of the best possible recovery; the experience and views of plaintiffs' counsel; whether there is any evidence of

collusion; the extent of discovery and the stage of the proceedings; the expected length, complexity and expense of further litigation; and objections to the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D.Cal.1978). The court should not simply place a "mere 'rubber stamp,'" *Boyd*, 485 F.Supp. at 617 (quoting *Detroit v. Grinnel Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)), on the settlement or "determine whether a better settlement might have been negotiated." *Boyd*, 485 F. Supp. at 617. In addition, the court must bear in mind the "overriding public interest in settling large class actions." *Boyd*, 485 F.Supp. at 617.

The present case is unusual in the sense that the Court has the benefit of having heard the merits of the case fully litigated at trial prior to evaluating the settlement. In fact, the Court was prepared to issue a ruling on the merits of the action at the time the parties presented the proposed settlement agreement. Having seen the relevant evidence, the court is especially cognizant of the relative strengths and weaknesses of each party's case. After evaluating the settlement agreement in lights of the factors listed above, the Court finds that the settlement is fair, adequate and reasonable. Although not providing the class with all of the remedies sought, the settlement provides substantial relief to the class while also conceding some issues to defendants in the spirit of compromise that is necessary to achieve any settlement.

A. Route System

The settlement provides "early-outs" with travel benefits on the entire domestic route system which includes the continental United States, Alaska, Hawaii, Canada, Mexico, Puerto Rico, the Bahamas and Bermuda. This is a major gain for the class over the old Delta benefit program. It is surely as much if not substantially more than the plaintiff class could have expected to achieve by allowing this Court to resolve the action.

B. Boarding Priority

Under the settlement, class members are assigned the same boarding priority as retirees. Persons who held H-1 term cards at Western will be assigned an April 1, 1987 fictional hire date. Persons who held F-1 term cards will be assigned a fictional hire date 15 years later than their Western hire date. Delta may adjust these boarding priorities in the future, but any such adjustment will not cause "early-outs" to lose their boarding priority relative to actual retirees.

This is a significant concession by the class in making the settlement agreement. However, it is not a result that is completely inconsistent with the merits of the plaintiffs' case. The evidence presented to the Court was not sufficient to support a finding that plaintiffs are entitled to be given a boarding priority equal to that of active Delta employees. The "early-outs" are not active Delta employees. Accordingly, they are not entitled to a boarding priority as if they were. The letter of agreement does not grant such status to the "early-outs." While this provision of the settlement also affects the relative priority of Western and Delta retirees and is short of what plaintiffs hoped to achieve at trial, it is reasonable in light of the strength of plaintiffs' case and the trial risk on this issue.

C. Pass Insurance Procedures

Within six months of this Court approving the settlement, Delta will issue pass cards to each class member which will allow then to prepare their travel passes without having to request passes from Delta's pass bureau. This is another large gain for plaintiffs. Plaintiffs will no longer have to apply for travel passes weeks in advance of their travel date. This allows for the potential use of travel benefits in emergency situations and for spontaneous trips.

D. Service Charges

Service charges for use of travel benefits by members of the class have been eliminated. Eligible dependent children and parents of class members will be charged a nominal service charge when they fly more than three times a year. This is another improvement over the prior system.

E. Dismissal of Monetary Claims

The agreement contemplates that class members will waive any claims they have for monetary damages arising out of Delta's administration of the old travel benefits program. This concession is not substantial in light of the manifest problem of marshalling supporting evidence for such claims. The evidence presented to the Court at trial and during the fairness hearing in this regard described asserted claims that were largely unsubstantiated as to actual damages and causation. Those claims described that appeared to contain potential merit were actions that would be difficult to prove at trial and therefore contained a high risk of failure.

F. Inapplicability of ERISA

The settlement agreement states that the travel benefits provided to the class members are not subject to the provisions of ERISA. This clause effectively vacates the Court's earlier ruling on this issue.

This concession by the plaintiffs must be considered in light of the litigation context as the legal basin for the Court's earlier ruling on the ERISA issue was not overwhelmingly supported by legal precedent and was subject to being reconsidered by this Court if it was required to rule on the merits of the action.

G. Attorneys' Fees and Costs

As discussed above, these fees are reasonable and completely appropriate in a class action settlement.

The Bowen group contends that the settlement is unfair because it precludes the possibility of reinstatement. As mentioned above, the evidence before the Court shows that the vast majority of the class members are not interested in reinstatement. The class members have relocated, acquired new jobs and restructured their lives since leaving western. Many of the "early-outs" left Western so they could devote more time to their families. These former Western employees did not leave their jobs simply for the travel benefits, there were other considerations that caused them to take the "early-out" option. The majority of the class members are essentially concerned with improving their travel benefits, not with returning to the jobs they left years ago. Therefore, the lack of any reinstatement remedy within the settlement does not greatly prejudice the class.

Evaluating the settlement agreement in the aggregate, against the background of the relative merits of each party's case and the litigation risk the plaintiff class takes in submitting the case to the Court for ruling on the merits of the case presented at trial, the Court finds the settlement to be very fair, adequate and reasonable. Although it is has been made clear by the testimony presented at the fairness hearing that not all class members approve of the settlement, this is only one factor that this Court is required to consider when deciding if the settlement should be approved. The Court also notes in this regard that it received written responses from class members in favor of settlement who did not appear at the May 19 hearing.

In evaluating this settlement it is not the Court's duty to decide whether a better settlement for either party could have been

reached, although the Court is doubtful that plaintiffs could have achieved such an outcome. The Court's duty is to evaluate the settlement by considering the factors outlined above. After doing so, the Court is convinced that this settlement agreement should be approved. Therefore, under Rule 23(e) the Court hereby approves the tentative settlement agreement between the parties in this action.

Accordingly, the proposed plaintiff class is hereby certified as a Rule 23(b)(1) and 23(b)(2) class, and the settlement agreement between the parties is hereby approved.

IT IS SO ORDERED.

DATED: June 28, 1989.

D. Lowell Jensen
United States District Judge

Supreme Court, U.S.
FILED
AUG 13 1991
OFFICE OF THE CLERK

(2)

No. 91-84

In The

Supreme Court of the United States

October Term, 1991

DEBORAH BELCASTRO-BOWEN, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and MARILYN WILEY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

WALTER A. BRILL
MARY E. RAINES
DELTA AIR LINES, INC.

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111-2514
Telephone: (415) 986-4200

Attorneys for Respondent Delta Air Lines, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question raised by petitioners does not present an issue that is proper for review by this Court because the factual assertions underpinning the argument are unsupported by the record, there being no question that the attorney in the *Wiley* action – the only case certified and settled as a class action – had the consent of each of his four clients and class representatives to execute the agreement and to present it to the district court for approval. Consequently, the only real question presented by the petition is whether approval of individual class members is a prerequisite to court approval of a class action settlement that is presented to the court for approval with the recommendation of the individual class representatives and class counsel.

LIST OF PARTIES

The Respondent is Delta Air Lines, Inc.[1]

The Petitioners are Deborah Belcastro-Bowen; Marleena Reiser; Alice Moloney Adams; Pamela R. Bailey; Judith D. Beal; Carol Bunce; Stephanie Cohen; Deborah L. Connor-Cook; Barbara J. Daly; Sheila J. Dickerson; Wendy Dillon; Joan H. Doram; Debra Dubord; Connie M. Forde; Roberta May Freeman; Lawrence Hahn; Gail Louise Haller; Emily D. Heath; Carol A. Hogan; Marcella Hunt-Peterson; Carole Leavelle; Sharon Lessinger; Chrissie B. Lovold; Susan L. Magliano; Mary Ann Pearson; Diane Reilly, Toby S. Sadasky; Anabelle Simmons; Cyndee Rae Sinardi; Patricia L. Smith; Rhonda J. Svendsen; Jennifer Terrio; Jo Anne Utz; Laraine Valdespino-Pozzo; Linda Johnson Walden; Janice M. Waller; Cynthia Weber; Gina Youngren; Sandy Yslas-Vanderburg; and Kathy Zablocki.

The parties to the proceedings below are petitioners and respondents in this Court, except that Craig Andrews; Pamela Brenot; Constance S. Cramer; Sandra S. Foley; Barbara Jensen-Amdjadi; Sharon Miller; Colleen Smith; Elise Stevens and Cheryl Wendell were appellants below, but are not petitioners in this Court.

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[1] There is no parent company of Delta Air Lines, Inc. and there are no subsidiaries of Delta Air Lines, Inc. which have issued shares to the public. Delta Air Lines, Inc. holds an approximately 20% equity interest in the following companies which have issued shares to the public:

Atlantic Southeast Airlines, Inc.
SkyWest, Inc.
Comair Holdings, Inc.

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No. 91-84

In The

Supreme Court of the United States

October Term, 1991

DEBORAH BELCASTRO-BOWEN, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and MARILYN WILEY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

Respondent Delta Air Lines, Inc. respectfully prays that this Court deny the petition for a writ of certiorari filed by Deborah Belcastro-Bowen, et al. because the factual assertions upon which their argument is based are unsupported by the record and because there is no important question raised by the petition meriting review by this Court.

OPINIONS BELOW

The unpublished memorandum of the Court of Appeals for the Ninth Circuit, entered April 15, 1991, is reprinted in the Petitioners' Appendix at 1a.

The unreported order of the district court granting class certification and approving the class settlement, entered June 28, 1989, is reprinted in the Petitioners' Appendix at 12a.

JURISDICTION

The Memorandum for the Court of Appeals for the Ninth Circuit affirming the judgment of the district court was entered on April 15, 1991. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE INVOLVED

Rule 23(c)(1) and (e) of the Federal Rules of Civil Procedure (Fed.R.Civ.P. 23(c) and (e)) provide in pertinent part:

. . .

> (c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

. . .

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

1. Petitioners' Claims.

Petitioners have misrepresented several aspects of the facts in the record of the previous proceedings, and respondent therefore believes it appropriate to clarify the facts underlying this matter.

Petitioners are former Western Air Lines, Inc. (Western) flight attendants who voluntarily resigned their employment with Western and therefore were eligible for free and reduced rate travel privileges on Western under a series of "early out agreements" between Western and its employee unions. Petitioners allege that Delta Air Lines, Inc. ("Delta") impermissibly altered their travel privileges after it merged with Western in 1987. They include several individuals who were part of a group of 42 plaintiffs in a federal court action in Seattle and a number of additional individuals who were members of the class certified below. After extensive settlement negotiations in the action below (*Wiley v. Delta*) and the Seattle case (*Eaton v. Delta*), the parties reached a fair, adequate and reasonable settlement. The settlement was preceded by a full trial based predominantly on a stipulated record, a fairness hearing held subsequent to the district court's

preliminary approval of the Settlement Agreement, and tentative certification of a class.

Petitioners objected to the settlement below, and continued to attack the agreement on appeal, arguing that its provisions did not give the plaintiffs and the class all they wanted and therefore was inadequate. Here, they argue the agreement was forced on them without their consent. They continue to press their appeal despite the district court's finding that the settlement on the whole gave the petitioners more than they could have expected from a judgment from the court.

2. Case History.

Between 1984 and 1986 Western sought to reduce the size of its workforce by offering an "Early Out" program to its various employee unions. Petitioners resigned from Western under these programs in return for free and reduced rate travel benefits for them and certain of their family members. After Western merged into Delta in 1987, Delta continued to provide travel privileges over the former Western system to the early-out participants, but modified certain procedural and operational aspects of the program to make it consistent with the existing travel privilege structure Delta provided for its own employees and retirees.

In 1987, two lawsuits were filed against Delta to enforce the Early-Out Agreement: a 4-plaintiff action entitled *Wiley v. Delta Air Lines, Inc.*, No. 87-2273 (N.D.Cal.), alleged to be a class action on behalf of all early-out participants, and a 42-plaintiff action entitled *Eaton v.*

Delta Air Lines, Inc., No. 87-748 (W.D.Wa.). Jurisdiction was premised on 28 U.S.C. §§ 1331 and 1337 and 28 U.S.C. § 1132. Six of the 42 *Eaton* plaintiffs are among the petitioners here. Plaintiffs' attempt at class certification prior to any discovery or pretrial proceedings was rejected by the *Wiley* court, and by 1989, both courts had denied summary judgment motions by Delta but had ruled that the Early Out Agreements had established employee welfare benefit plans that were subject to ERISA. This latter ruling was subject to reconsideration at the trial of the action. The *Wiley* case was tried in November of 1988.

In January 1989, while awaiting the district court's trial decision in *Wiley*, Delta entered into a proposed Settlement Agreement in both *Eaton* and *Wiley*. The settlement was reached primarily because the district court in the Western District in Washington had ordered the *Eaton* case, which involved issues identical to those raised and tried in *Wiley*, into mediation. The Settlement Agreement required dismissal of the *Eaton* and *Wiley* actions with prejudice, and the certification of a class under Fed.R.Civ.P. 23(b)(1) and (b)(2) in *Wiley*. (Petitioners' Appendix at 6a.)

The attorney for the four *Wiley* plaintiffs (David Rosenfeld), with his clients' support and approval, moved the *Wiley* court for class certification and sought approval of a notice to the class. The motion was supported by Delta, which noted that the issues that previously had precluded class certification had been resolved in the discovery process and that a settlement binding on the class was necessary in order to avoid inconsistent and conflicting adjudications of the common issues involved.

The motion was further supported by the declarations of the plaintiffs' and defendant's attorneys, as well as a declaration from the attorney for the 42 plaintiffs in *Eaton* (Fredric Reed).[2]

Petitioners here allege that, in order to secure the settlement, (1) *Eaton* plaintiffs' attorney Mr. Reed misrepresented in his declaration the degree of support for the Settlement Agreement which he had elicited from the 42 *Eaton* plaintiffs, and (2) *Wiley* plaintiffs' attorney and class counsel Mr. Rosenfeld stated to one of the class members that he would not get paid if the settlement was not approved (a statement Mr. Rosenfeld denies making).

All of petitioner's arguments with respect to whether all of Mr. Reed's clients fully agreed to the settlement are irrelevant because Mr. Reed was not class counsel and his clients were not class representatives – he was not an attorney of record in *Wiley* and he acted as counsel only for the forty-two individual plaintiffs in the *Eaton* case, who, as members of the class, would be bound regardless of their approval. Their consent was not necessary to validate the settlement in *Wiley*. Later, the Ninth Circuit found that "[As] to the questioned activities of [Mr.] Reed, the district court reviewed the written allegations, received supplemental declarations from Reed explaining his declaration, held a hearing, and then concluded that his conduct had not 'tainted' the decision by the court 'to

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[2] The district court accepted Mr. Reed's subsequent explanation that he based his declaration representing that he had the approval of the *Eaton* plaintiffs on a "majority rule," i.e., he had received approval from 37 of the 42 plaintiffs in that action.

tentatively certify the class and to request a fairness hearing on the proposed settlement.'" (Petitioners' Appendix at 11a) As to the petitioners' complaints about Mr. Rosenfeld, the district court observed:

> [T]here has been a showing made that Rosenfeld was not always gracious and patient when dealing with class members and that he did not respond to all requests for legal advice. However, these actions did not prejudice the case he competently and vigorously presented to this Court. In addition, Rosenfeld was technically not representing the class members, other than the named plaintiffs, before this Court tentatively certified the class following trial. Thus, any refusal on his part to respond to legal inquiries beyond direct issues related to class certification was not inappropriate until after the class was in fact certified.

Petitioners' Appendix at 21a-22a.

Based on a preliminary review of the agreement and the various declarations, the district court ordered a fairness hearing to afford class members an opportunity to object to the settlement and the class certification; the court also tentatively certified a (b)(1) and (b)(2) class and authorized a notice to the class informing it of the tentative class certification, the proposed settlement agreement, and the scheduled hearing to consider objections to the agreement and to the class certification. The proposed class consisted of 612 former Western employees. (Petitioners' Appendix at 18a)

A group of objectors, the Bowen group, consisting of most of the petitioners here, filed a motion to suspend the fairness hearings and decertify the class, principally on the ground that the Settlement Agreement had been

entered into without approval or authority of the *Eaton* plaintiffs. The court rejected the motion, stating that the *Eaton* plaintiffs could express their objections at the fairness hearing.

Prior to the fairness hearing the court received comments on the proposed Settlement Agreement from 94 individuals, 84 of whom opposed it. At the fairness hearing, the court heard and entertained oral argument from counsel for the objectors. The court heard testimony of 26 members of the proposed class and two of the *Eaton* plaintiffs in opposition to the settlement. All proposed class members who attended the fairness hearing were given the opportunity to address the court regarding the proposed agreement. At the end of the hearing, the court also heard brief oral arguments of counsel for the plaintiffs in *Wiley* and counsel for Delta in support of the agreement.

Petitioners' allegation that the district court failed to acknowledge the issue of the class members' consent to the Settlement Agreement simply ignores the record, and is without merit. The court only issued its order certifying the class and approving the Settlement Agreement after considering the briefs submitted by the parties, the trial record in the action, the terms of the proposed Settlement Agreement, and testimony and comments of the proposed class members presented at the fairness hearing. (Petitioners' Appendix at 11a) The text of the court's order granting class certification and approving the settlement explicitly addresses and dismisses the plaintiffs' assertion that they were in any way inadequately represented by counsel. (Petitioners' Appendix at 19a-22a.)

On appeal to the Ninth Circuit, petitioners recast their inadequate representation claims, characterizing the same allegations as claims of "fraud, collusion, and overreaching." Petitioners asked the court not to use class action procedures to "sanction" a settlement agreement entered into without the express consent of all the putative class members. The court rejected the argument based on two separate findings. First, it specifically found that:

> [T]he district court did exactly what this court has asked district courts to do when deciding whether to accept a proposed settlement agreement. The record makes clear that the district court came to a reasoned judgment that the agreement was not the product of fraud, collusion or overreaching, and the district court expressly determined that it was fair, reasonable and adequate to all concerned parties.

(Petitioners' Appendix at 11a.)

The Court of Appeals also held that the district court had not abused its discretion in finding that the conduct of the *Eaton* plaintiff's counsel had not "tainted" the court's decision to tentatively certify the class and to request a fairness hearing on the proposed settlement. Based on the record, it noted that the district court had engaged in a thorough analysis in conformance with the law on class action settlements, and properly had reviewed the written allegations, supplemental declarations from Mr. Reed, and extensive oral argument and testimony by plaintiffs at the fairness hearing. It observed that the district court had responded specifically to the

plaintiffs' concerns about attorneys fees[3] and an allegedly abrasive interaction between class counsel and one of the class members, and found that the trial court did not abuse its discretion in concluding that these actions did not rise to the level of fraud, collusion or overreaching. (Petitioners' Appendix at 10a-11a.)

The Ninth Circuit concluded its opinion by noting:

> The district court was in a unique position to determine the fairness of this particular settlement agreement. The court had conducted a two-day trial and was prepared to issue a ruling on the merits when the parties presented the court with the agreement. The court issued a twenty page order explaining why it found the agreement to be reasonable, adequate and fair; indeed the court was "doubtful the plaintiffs could have achieved such an outcome." This court's independent review of the record supports the district court's conclusion. Accordingly, we hold that the district court did not abuse its discretion.

(Petitioners' Appendix at 12a.)

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[3] The Ninth Circuit observed "[C]ontrary to appellants' allegations, the court did respond specifically to the objectors' concerns about the attorneys' fees. The district court found the fees to be "reasonable," and noted: "it is sometimes a distasteful reality that the practice of law is a business and that lawyers are entitled to fees for their services." (Petitioners' Appendix at 22a and 11a)

ARGUMENT

PETITIONERS FAIL TO RAISE AN IMPORTANT ISSUE UNDER FEDERAL LAW BECAUSE THE DISTRICT COURT SATISFIED ANY STRICT SCRUTINY REQUIREMENTS IN ASCERTAINING THE FAIRNESS, ADEQUACY AND REASONABLENESS OF THE SETTLEMENT AGREEMENT AND THE APPROPRIATENESS OF CERTIFYING A CLASS

Petitioners seek review in this Court based on their assertion that the procedure used by the district court in certifying a class for the purpose of settlement violated Fed. R. Civ.P. 23(c)(1) and (e). They specifically allege that Fed.R.Civ.P. 23(c)(1) precludes a trial court from certifying a class only for settlement, and that the district court violated Rule 23(e) by approving the *Wiley* settlement without the approval of the putative class members.

(1) Certification of a class in connection with a settlement agreement is fully consistent with Rule 23 Procedures and Due Process Requirements.

This Court need not look beyond the very cases cited by petitioners to find that the district court's approval of the Settlement Agreement and certification of a class in the face of objections by some of the putative class members is fully consistent with Rule 23's requirements. While the practice of deferring class certification until settlement has been criticized in some circumstances, every court addressing the issue has declined to hold that the procedure violates Fed.R.Civ.P. 23 or requires that the certification or settlement be disapproved. *Mars Steel v. Continental Ill. Nat. Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987), later proceeding *Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co.*, 120 F.R.D. 53 (N.D. Ill. 1988),

aff'd, en banc *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989). In *Weinberger v. Kendrick*, 698 F.2d 61, 73 (1982), the Second Circuit stated that "[W]e emphasize that we are permitting, not requiring, use of this procedure, and also underscore that . . . district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care".

Petitioner's reliance on *In the Matter of American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988), is misplaced. There, the Seventh Circuit's misgivings concerning the desirability of class certification are specifically addressed to the context of the Bankruptcy Court, which is already a collective proceeding. *Id.* at 490, 493. A more careful reading of the authorities cited by petitioners reveals that a trial court certifying a class in the context of a settlement must simply be particularly careful in scrutinizing the fairness of the proposed settlement agreement.

The more careful scrutiny principle has been adopted by some courts to assure against the possibility of collusion or undue pressure by defendants on would-be class representatives. *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981). *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982). Rather than setting down any form of absolute rule, however, the decisions place discretion in the district court to assess the strength of the party's case, the prejudice to absent class members caused by settlement, the institutional costs of certification and hearing, and the possibility of collusion; and they subject the court's decisions on those issues only to a deferential "abuse of discretion" standard of review. *Mars Steel, supra*, 834 F.2d at 862; *Simer, supra*, 661 F.2d at 666. In determining the

fairness of a settlement agreement, courts have examined the substantive terms of the settlement and the negotiating process by which the settlement was reached, have demanded that the compromise be the result of arm's-length negotiations, and have determined whether plaintiffs' counsel possessed sufficient experience and ability and engaged in the discovery necessary to effectively represent the class' interest. *Weinberger, supra,* 698 F.2d at 73-74.

(2) The *Wiley* court meticulously considered the fairness of the settlement agreement in compliance with the most demanding tests outlined in applicable case law.

One look at the district court's ruling in *Wiley* dispels any doubts that the court engaged in an exacting review of exactly these types of concerns. It did not issue its final order approving the settlement until after notice had been served on all of the putative class members and after a full hearing on the fairness of the Settlement Agreement, at which a large number of the petitioners testified about their objections. The court was in a unique position to evaluate the strengths and weaknesses of the *Wiley* Settlement Agreement because it had tried the case and was prepared to rule on the merits just as the parties came to court with the proposed agreement. The court discussed each of plaintiffs' claims on the disputed travel privileges, the issue of attorney's fees and costs, petitioner's allegations of inadequate representation by counsel, and the appropriateness of certifying the class under Fed.R.Civ.P. 23(b)(1) and (b)(2), concluding that certification was proper and that the settlement was very fair,

reasonable and adequate. On the issue of including fees for class counsel in the settlement, the court noted that inclusion of a fee in a settlement agreement does not create a conflict of interest under well-established Supreme Court authority (*Evans v. Jeff D.*, 475 U.S. 717 (1986), reh. denied *Evans v. Jeff D.*, 476 U.S. 1179 (1986)), and held that the fee involved was reasonable. Finally, the court also stated "[I]t is not the Court's duty to decide whether a better settlement for either party could have been reached, although the Court is doubtful that plaintiffs could have achieved such an outcome." (Petitioners' Appendix at 27a-28a.)

Petitioners stake a significant portion of their argument on the proposition that an attorney has an absolute ethical duty to secure a client's approval before entering into a settlement agreement, and that attorneys have no authority to settle an action without their client's approval. Petitioners' reliance on *Harrop v. Western Air Lines, Inc.*, 550 F.2d 1143 (9th Cir. 1977), *Fennel v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1988) and *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987), for this argument is misplaced, because all of these cases concern an individual suit; none involves a class action suit.

It is important to note that *all* of the *Wiley* plaintiffs – the only plaintiffs certified as class representatives – approved the settlement agreement. Petitioners do not allege to the contrary. Thus, *all* of plaintiffs in *Wiley* – the case that was certified as a class action and settled on that basis – did approve it and consent to the settlement. None objected to it. Whether the individual plaintiffs in *Eaton*, who had no greater standing than any other class

member, approved the settlement is a subject of no material relevance. They were bound to the same extent as all class members.

Second, class actions are not subject to a requirement of prior approval of all class members. The district court acknowledged that not all class members approved the settlement, and correctly stated that this was only one factor that the court was required to consider when deciding whether the settlement should be approved. That a class action suit may be settled without absolute unanimity within the putative class is soundly supported by case law. A settlement is not made unfair or unreasonable because a large number of class members oppose it. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977), later proceeding *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158 (11th Cir. 1988), reh. denied, en banc *Cotton v. U.S. Pipe & Foundry Co.*, 861 F.2d 1281 (11th Cir. 1988) (approving a settlement opposed by 50% of the class); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1974), *cert. denied sub nom. Abate v. Pittsburgh Plate Glass Co.*, 419 U.S. 900 (1974), reh. denied *Abate v. Pittsburg Plate Glass Co.*, 420 U.S. 913 (1975) (approving settlement opposed by over 20% of the class); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (approving a settlement over the objections of approximately 56% of the class).

Accordingly, petitioners have failed to demonstrate that the fact that some of the members of the class opposed the Settlement Agreement in any way affected the validity of the Agreement itself or the district court's

certification of a class. The record in this action establishes that the class certification procedure approved by the district court was proper, in accordance with all applicable authorities, and in no way prejudiced the petitioners' ability to assert their beliefs regarding the agreement or its fairness.

CONCLUSION

For the reasons discussed above and in the Ninth Circuit District Court's opinions, this Court should deny this petition for a writ of certiorari.

Dated: August 13, 1991

Respectfully submitted,

WALTER A. BRILL
MARY E. RAINES
DELTA AIR LINES, INC.

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON

By: GILMORE F. DIEKMANN, JR.
Attorneys for Respondent
Delta Air Lines, Inc.
Gilmore F. Diekmann, Jr.

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No. 91-84

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MARILYN WILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners

September 1991

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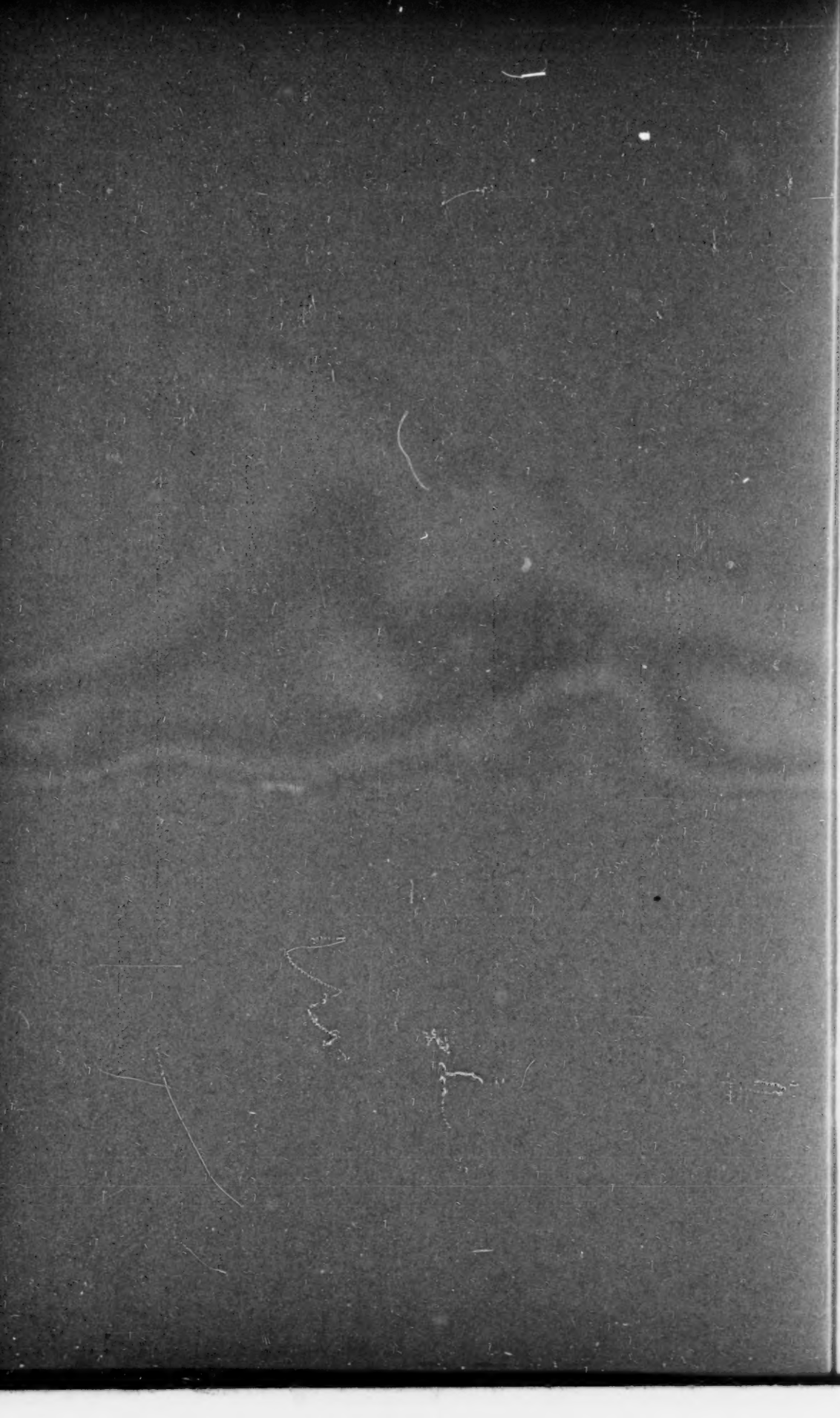

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IN THE

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DEBORAH BELCASTRO-BOWEN, *et al.*,
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PETITIONERS' REPLY MEMORANDUM

Petitioners seek a writ of certiorari because the Court should decide the important issue of whether class action procedures may be used to sanction unethical settlement agreements. Respondent Delta Air Lines, Inc. ("Delta") largely ignores this issue by misstating it. Contrary to Delta's argument (Delta Opposition at 11), petitioners do not contend that all settlement classes violate Fed. R. Civ. P. 23 or that all class

members must consent to the settlement. The issue raised by petitioners is whether the district court could certify a class only for settlement when the underlying settlement agreement was unethically entered into without the client's consent. If this procedure is permitted, attorneys will be free to negotiate a settlement without a duty to their clients or their class, and then impose it upon both.

To the extent Delta addresses the actual issue raised by petitioners, Delta argues that the issue is not important because 1) the ethical obligation of an attorney not to make agreements without the consent of the clients is not applicable to settlement agreements which are the basis for a settlement class, 2) the attorney involved in the unethical conduct in this case was allegedly not class counsel and affected clients were not class representatives, and 3) there was no unethical conduct because a majority of the clients approved the settlement agreement the attorney had signed.

Delta correctly states (Opposition at 11) that petitioners base their argument on the principle that attorneys have an absolute ethical duty to secure a client's approval before entering into a settlement agreement and without such approval attorneys have no authority to make a settlement agreement. Delta then claims that this principle is not applicable to class action suits. This is the very issue that petitioners seek to have adjudicated by the Court. Delta presents no rationale for why the normal ethical obligations should not apply to settlement agreements which are entered into before a class is certified. Delta does not explain why a client should lose her right to control settlement of a lawsuit just because an attorney violates his ethical obligations and then uses the unethical settlement as a basis for seeking class certification.

Delta argues that the attorney representing the Seattle Eaton plaintiffs was not class counsel and that his clients were not class representatives. The courts below made no finding on this claim. In the papers supporting the motion for class certification, Seattle counsel Mr. Reed referred to himself as "class counsel" and asserted his willingness to fully and fairly represent the class (Clerk's Record 77 at 5). In those same papers, Delta extolled the qualifications of Mr. Reed and stated that Mr. Reed had done an excellent job of representing the interests of his clients and the class (CR 76 at 5). The notice to the class stated that questions should be directed to Mr. Reed and Mr. Rosenfeld, who were listed as attorneys for plaintiffs and the class. The Settlement Agreement was signed by Mr. Reed as attorney for the plaintiffs and the class. Mr. Reed also received attorneys' fees under the Settlement Agreement. Delta is simply wrong where it asserts Mr. Reed was not an attorney for the class.

Delta is also wrong when it asserts that the Seattle Eaton plaintiffs were not class representatives. The Settlement Agreement that was the basis for class certification was an agreement for both the Seattle Eaton case as well as the San Francisco Wiley case. A pre-condition of the Settlement Agreement was that plaintiffs in both cases agree to the settlement. Moreover, Mr. Rosenfeld was attorney for both the Seattle Eaton plaintiffs and the San Francisco Wiley plaintiffs. Mr. Reed's and Mr. Rosenfeld's ethical obligation to secure their clients' approval before entering into a settlement agreement was not removed simply because they made the tactical decision to seek class certification in Wiley rather than Eaton.

Finally, Delta asserts without citation that the district court accepted Mr. Reed's explanation that he had the approval of a majority of the Eaton plaintiffs (Delta Opp. at 6, n.2). The

district court neither accepted nor rejected Mr. Reed's post hoc majority rule explanation. It ignored Mr. Reed's unethical conduct altogether. In any event, there is no factual or legal basis for Mr. Reed's and Delta's majority rule claim because none of the Seattle plaintiffs had agreed to be bound by majority rule (CR 95, Exh. A) and each client must approve a settlement agreement. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 834-35 (9th Cir. 1976).

For the reasons stated in their petition and this reply, the court should grant the writ of certiorari to prevent the use of settlement classes to impose unethical settlement agreements on an attorney's own clients.

Respectfully submitted,

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W., #1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners